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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-334

PATRICIA ANNE NORTH,
Respondent,

vs.

KENNETH E. NORTH,
Petitioner.

PETITION FROM THE SUPREME COURT OF KANSAS
KANSAS SUPREME COURT CASE NO. 47701

PETITION FOR WRIT OF CERTIORARI

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INDEX

I. General Summary 1

II. Statement of the Case 3

III. Basis for Certiorari Petition 6

AUTHORITIES

Fourteenth Amendment, U.S. Constitution 2, 3

Motor Equipment Company v. *Winters*, 146 Kan. 127, 69 P.2d 23, 28 5

Truax v. *Corrigan*, 42 S. Ct. 124, 257 U.S. 312 ..... 8, 9

Wichita Council No. 1, etc. v. *Security Benefit Association*, 138 Kan. 841, 28 P.2d 976 5

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PETITION FOR WRIT OF CERTIORARI REVIEW

I. GENERAL SUMMARY:

This action is a petition for writ of certiorari taken from the final ruling of the Kansas Supreme Court in *North* v. *North,* Kan., 535 P.2d 914, in which the judgment of the Johnson County, Kansas District Court granting a decree of divorce to plaintiff on the grounds of incompatibility was upheld.

Defendant-petitioner, in appealing from the judgment and orders rendered by the trial court on April 22, 1974, directly assaulted the basis for the District Court's ruling, simultaneously challenging the operative law under which relief was granted, K.S.A. 1974 Supp. 60-1601(8), as an enactment that was repugnant to the United States Con-

stitution. The Kansas Supreme Court affirmed the lower court's decision on May 10, 1975, ruling that the statute was in fact constitutionally valid. Appellant moved the reviewing court for a rehearing on May 19, 1975, alleging numerous procedural and substantive errors in the concurring court's decision. The motion for rehearing was denied on June 2, 1975, and the Kansas Supreme Court issued its mandate in the action on June 5, 1975.

This petitioner consequently filed a notice of appeal to the Supreme Court of the United States with the Clerk of the Kansas Supreme Court on June 5, 1975, invoking the higher court's jurisdiction in accordance with the provisions of 28 U.S.C. § 1257(2).

On September 2, 1975, the above-referenced appeal was docketed with the Clerk of the United States Supreme Court pursuant to U.S. Sup. Ct. Rule 13. This petition, filed with the Court on the same date, seeks to have an additional legal issue argued below—but not intrinsically related to the statutory challenge—incorporated into the consideration of issues now before the Court on appeal.

Petitioner seeks this expanded scope of review pursuant to 28 U.S.C. § 1257(3), contending that his right to due process of law provided for by the Fourteenth Amendment to the U.S. Constitution has been abridged.

This petition exclusively confines itself to the question of due process in this action, both at the trial and state review level. Specifically, two questions are raised herein for this Court's consideration:

A. May a trial court reach a conclusive determination on the merits of an issue after a preliminary hearing and before the trial without violating due process?

B. May a review court decline to address a question of law properly presented on appeal without violating due process?

Both questions rely entirely on the Fourteenth Amendment, United States Constitution, which states that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.
>
> U.S.C. Const. Amend. 14 § 1.
>
> (P. 3-4, Constitution of the United States, Annotated).

II. STATEMENT OF THE CASE:

Questions of law presented by this petition are profoundly simple in their factual composition.

On April 22, 1974, the Johnson County, Kansas District Court, Division I, considered this case on the merits. Upon the conclusion of plaintiff's case-in-chief and its submission to the court, the trial court made several preliminary remarks for the benefit of both parties prior to announcing its findings and the resulting conclusion of law.

Intent on explaining his philosophy and application of law to the instant case, the Honorable Herbert W. Walton, Division I District Court Judge, made the following statement:

> I cannot help but look back at the hearing I had . . . concerning the need for and the futility of marriage counseling. *The Court, after having heard all of that evidence, made a decision that it would be futile in this particular case for the parties to try to resurrect a marriage that is already buried* . . . (R. 79) (italics added).

Since there was no specific indication during the trial itself that the court had already reached a conclusion on the merits of plaintiff's prayer-for-relief after considering evidence adduced at a preliminary hearing on defendant's motion for court-sponsored marriage counseling (R. 6), petitioner's first opportunity to challenge this alleged deprivation of due process came on appeal to the Kansas Supreme Court.

The due process question raised initially here was summarized in "point four" of an amended statement of points filed with the District Court on August 30, 1974 pursuant to Kansas Sup. Ct. Rule Six, thereby reviewable under rule and prevailing case-law:

> 4. The defendant was effectively denied due process in that the trial court had concluded that the marriage could not stand prior to the onset of trial. (R. 22).

Petitioner essentially argued below that no amount of rationalization would change the simple fact that the trial court had, by its own unequivocal admission, effectively rendered judgment in favor of plaintiff prematurely and prior to the onset of trial. (P. 24, Brief of Appellant). Defendant-Petitioner's brief invited the Kansas Supreme Court's attention to the fact that it had, on previous occasions, ruled that "due process of law . . . held to mean that a law hears before it condemns, which proceeds on

inquiry, and renders judgment only after trial." *Motor Equipment Company* v. *Winters*, 146 Kan. 127, 69 P.2d 23, 28; *Wichita Council No. 1, etc.* v. *Security Benefit Association*, 138 Kan. 841, 28 P.2d 976, 980, 94 A.L.R. 629.

Plaintiff-respondent argued in her brief that the trial court had no alternative but to reach a premature conclusion on the merits in order to dispose of defendant's own motion for court-sponsored counseling:

> In short, the Court is saying at the conclusion of the first hearing it found that the marriage appeared to be in an irreconcilable posture (which the Court properly was required to do in order to justify denial of defendant's own motion for marriage counseling) and that *again* at the conclusion of the trial itself the Court also found that from the additional evidence therein adduced, it still felt that the marriage was in an irreconcilable posture. (P. 20, Brief of Appellee).

The review court's decision, however, made no reference to either party's argument or to the validity of the defendant's due process challenge. The question simply wasn't passed on.

Presumably, the Kansas Supreme Court felt that it had disposed of the matter when it concluded that the action was not a unilateral divorce, thereby rendering all constitutional questions moot. The Court's explanation closed with the observation that "All points raised by defendant have been considered and found to be without merit. . . ." *North* v. *North*, Kan., 535 P.2d 917.

Petitioner's motion for rehearing respectfully reminded the review court that it had not resolved the due process question and that, since the procedural issue involved transcended questions of evidential character or scope, its rejec-

tion of defendant's unilateral interpretation had no bearing whatsoever on the due process point. (Count IV, P. 3, Mot. for Rehearing).

Plaintiff-respondent countered in her answer to the motion with an assertion that:

> The appellee's brief met that argument and it is patently without merit. The argument is even more specious than all of the other arguments of appellant in his brief (which may be the reason why appellant did not even choose to mention it in his oral argument) and there is certainly no reason why this Court is required to specifically mention such a transparently fallacious assertion in its written decision. (P. 3, Appellee's Response in Opposition to Appellant's Memorandum Motion for Rehearing).

The Supreme Court of Kansas denied the motion for rehearing without comment on June 2, 1975, thereby necessitating this petition in order that defendant-petitioner's asserted due process rights may be conclusively adjudicated.

III. BASIS FOR CERTIORARI PETITION:

The substantive thrust of petitioner's cause here is twofold:

A. The Trial Court's Premature Finding Abridged Defendant's Right to Due Process

The fact that the trial court rendered judgment on the pivotal issues prior to the trial in this action is not contested by plaintiff-respondent, who argues instead that it was necessary for the trial court to address the issue of

"irreconcilable differences" in order to rule on defendant's motion for marriage counseling.

Yet, given the fact that plaintiff sought a divorce on the exclusive grounds of incompatibility, it is readily apparent that "irreconcilable differences" was the basic issue to be addressed by the trial court when the case was heard on the merits.

The substantive question controlling at this point, then, is whether or not that premature conclusion was actually prejudicial to defendant's constitutional right to a fair and impartial hearing, or was simply a preliminary finding consistent with that stage of the proceedings and a necessary response to defendant's own motion.

There is probative value to plaintiff's assertion that the trial court was simply discharging its statutory duty in the exercise of discretion invested in it by K.S.A. 1974 Supp. 60-1608 which entitled the court to evaluate the constructive potential for marriage counseling; and if the petition for divorce itself rested on grounds other than incompatibility, there would be no constitutional conflict interposed here.

Petitioner maintains, however, that his motion for marriage counseling neither asked nor authorized the trial court to address any other issue than whether or not counseling would be beneficial—a decision that could have been made on the basis of an inquiry that fell short of addressing the issue of any alleged "irreconcilable differences". If the trial court felt compelled to consider that issue in order to rule on the defendant's motion, the ruling should have been stayed until the cause had been heard on the merits at the trial itself. The statute involved invests significant discretionary latitude in the District Court that would clearly

encompass a postponement until the issues had been placed in proper sequence.

The very fact that the decision reached by the trial court after the trial uniquely coincides with the decision reached by the same court after a preliminary hearing held weeks earlier is indicative of predisposition. To suggest that the court could have readily "reversed" its first conclusion had the evidence adduced at the subsequent hearing so warranted is to ignore the indisputable realization that human thought processes exert their own special momentum, an intellectual inertia that, once initiated, naturally and understandably seeks reinforcement rather than rejection.

Further, it is submitted that, while the law envisions circumstances in which plenary police power may infrequently impinge upon basic constitutional rights, it also anticipates an affirmative effort to either avoid or at least minimize the deprivations effected by the execution of statutory prerogatives.

In a 1921 case originating in Arizona, this Court held that:

> Due process of law requires that every man shall have the protection of his day in court and the benefit of the general law which hears before it condemns, and proceeds not arbitrarily, but upon inquiry, and renders judgment only after trial. *Truax* v. *Corrigan*, 42 S. Ct. 124, 257 U.S. 312, 66 L.Ed. 254, 27 A.L.R. 375.

Petitioner therefore respectfully submits that the premature finding in favor of plaintiff proceeded arbitrarily and predictably to a pre-determined conclusion, and further rendered inquiry conducted during the trial itself meaningless, superficial, and redundant.

The inevitable result was a ruling in obvious conflict with a reasonable interpretation of applicable decisions on due process handed down by this Court.

B. The Review Court's Declination Constituted a Further Denial of Defendant's Due Process Rights

Whatever the relative validity of this petitioner's assertion that the trial court's premature finding deprived him of due process, it is incontestable that it represented a question of "ponderable legal significance".

The working application of related statutes in this case generated an apparent dilemma unanticipated by the Legislature that could potentially evolve into a patterned deprivation of due process neither intended nor contemplated. That conflict alone would, by the standards of any prudent observer, present a question of law within the implicit jurisdiction of a state supreme court.

The salient issue here, however, is whether or not a "non-responsive" review even constitutes a "hearing", either within the meaning of the *Truax* ruling or due process doctrine.

It is clear on the face of the record itself that the Kansas Supreme Court did not address the issue of due process raised by defendant-petitioner, notwithstanding the fact that it was a properly-presented question of law brought on in strict compliance with the review court's own rules and the law of the forum.

Petitioner is inclined to suspect that an appellate court that "hears no error, sees no error, and speaks no error" might simply not be listening. When a review court makes no mention whatever of an issue—particularly a constitu-

tional issue—and postures no explanation detailing why the question has been discounted, a litigant's day in court is of dubious value, and the protection of the law is reduced to the appearance of a paper shield.

But most assailable is plaintiff-respondent's suggestion that the court need not respond at all if it chooses not to, an utterly untenable assertion that represents a monumental affront to judicial integrity.

Whatever the merits of a litigant's position, the appearance of fairness implicit in the due process concept requires, at base, either a rational explanation as to why the party's argument must succumb or some reference to applicable decisions of other courts that the defeated party may have recourse to.

No known source of law invested the American judiciary with a special measure of celestial insight entitling courts to rule as they exclusively see fit, handing down decisions from Olympian heights to solicitous and subservient subjects below. The Constitution that created the judicial function evolved from the doctrine of "right reason", mandating by clear and compelling implication that the courts rely on that same source of legitimacy in their day-to-day tasks.

Reliance on basic reasoning to which men of average intelligence and ordinary means could readily subscribe to is part and parcel of the social contract—as relevant and valid now as it was in the earliest days of the Republic.

Both the sovereignty and continuing viability of the Judicial Branch is wholly contingent upon the assumption that court decisions will be both rationally based and intelligently communicated in order that the public support so necessary to their ongoing acceptance will be as enlightened as it is volitional.

For that reason, petitioner respectfully submits that he is entitled to some semblance of inquiry into his asserted constitutional claim and therefore prays that this Court will permit him to consolidate the due process question framed herein with the other issues in this action currently before the Court on direct appeal.

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Please consult the Appendix in the Jurisdictional Statement filed in this action for reference to the subject decision and ruling on motion for rehearing.

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